

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

THE HIPSAVER COMPANY, INC.,

Plaintiff,

v.

J.T. POSEY COMPANY,

Defendant.

AND RELATED COUNTERCLAIM.

)
) Civil Action No. 05-10917 PBS
)

)
) ORAL HEARING REQUESTED
)

**FIFTH MOTION IN LIMINE OF J.T. POSEY COMPANY FOR ORDER
PRECLUDING EXPERT TESTIMONY BY EDWARD GOODWIN**

By this fifth motion in limine, defendant and counterclaimant J.T. Posey Company ("Posey") seeks an order pursuant to Rule 702 of the Federal Rules of Evidence precluding Edward Goodwin ("Goodwin") from providing any oral or written testimony regarding scientific, technical, or other specialized matters, and in particular, any oral or written testimony regarding the CDC washing guidelines or the mechanical specifications or properties of the materials from which the products at issue in this case are made.

Pursuant to Local Rule 7.1(A)(2), counsel for Posey has conferred with the plaintiff's counsel regarding this motion.

I. FACTS

HipSaver filed and served its Designation of Expert Witnesses on January 16, 2006, a copy of which is attached as Exhibit "A." In it, HipSaver designated three expert witnesses, i.e., Dr. Wilson Hayes, a technical expert; Roy Epstein, Ph.D., a damages expert; and Melvin Coons,

a chemist. HipSaver subsequently withdrew the designation of Mr. Coons, but it never sought leave to designate any additional experts.

One of the issues in this case is the truth or falsity of the statement on HipSaver's website that only its products can be washed in accordance with the so-called CDC Guidelines for Infection Control in the Laundry (the "CDC Guidelines"). The CDC Guidelines, which are available on HipSaver's website, set out two separate guidelines for the washing of laundry, i.e., a high-temperature washing guideline and a low-temperature washing guideline. In the Joint Pre-Trial Memorandum, HipSaver has asserted that the low-temperature washing guideline, which involves the use of low-temperature detergent, bleach, and "sour", is so complex and so involved that it is never used and that it is, consequently, irrelevant in the laundry industry.

During discovery, Posey designated as an expert, Kevin Minissian, who for many years has been designing and installing computer-controlled low temperature washing and chemical "dosing" systems for use in commercial, institutional and hospital laundries. Mr. Minissian is going to testify at trial that the low-temperature washing guideline is common in commercial, institutional and hospital laundries. Indeed, VA laundries, which HipSaver claims is its main customer, are required to follow the low-temperature guideline.

HipSaver has not designated an expert who has any experience with laundries or laundry issues. Therefore, Posey anticipates that HipSaver will attempt to introduce evidence regarding the prevalence of use of the CDC's high- or low-temperature washing guidelines through HipSaver's president, Edward Goodwin. In addition, in response to questions from his own attorney, Mr. Goodwin testified at deposition as to various technical issues surrounding the mechanical properties of Posey's Hipster product. Thus, at trial, Posey anticipates that HipSaver may attempt to elicit opinion testimony from Mr. Goodwin regarding various technical issues.

See Deposition of Edward Goodwin, taken 10/18/05, (hereafter, "Goodwin Depo., 10/18/05"), at 34:17-37:18, 94:11-95:22, 96:17-99:3, excerpts of which are attached as Exhibit "B."

II. ARGUMENT

A. The Court Should Preclude HipSaver From Offering Evidence Regarding Scientific, Technical, Or Other Matters Requiring Specialized Knowledge Through Mr. Goodwin Because Mr. Goodwin Was Never Identified As An Expert Pursuant to Fed. R. Civ. P. 26(a)(2)(a).

Rule 26(a)(2)(A) provides, in pertinent part, that each party "shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence." Here, HipSaver did not disclose Mr. Goodwin as an expert witness in its Designation of Expert Witnesses served on January 16, 2006. Neither did it ever supplement its disclosures, or seek leave to designate Mr. Goodwin as an additional expert, or serve an expert report for Mr. Goodwin. As a consequence, the Court should preclude Mr. Goodwin from submitting testimony regarding scientific, technical, or other matters requiring specialized knowledge because he was never identified as an expert pursuant to the rules.

B. The Court Should Preclude HipSaver From Offering Evidence Regarding Scientific, Technical, Or Other Matters Requiring Specialized Knowledge Through Mr. Goodwin Because Mr. Goodwin Is Not Qualified As An Expert Pursuant To Federal Rule Of Evidence 702.

During deposition, Mr. Goodwin testified that he earned a bachelor's degree in Biology with minors in education and chemistry from Bridgewater State College in 1973 and a master's

degree in psychology from Cambridge College in 1995. Goodwin Depo., 10/18/05, at 14:11-15:11. He also testified that he has taken some courses in business administration at Northeastern and that he has attended a couple of engineering seminars. Goodwin Depo, 10/18/05, at 18:11-24.

Federal Rule of Evidence 702 provides that:

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”

Under the Rules, “the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence.” *Advisory Committee’s Note on 2000 Amendment citing Bourjaily v. United States*, 483 U.S. 171 (1987).

Here, Mr. Goodwin’s company makes and sells hip protectors. While Mr. Goodwin may have experience in making hip protectors, he has no demonstrated knowledge, skill, experience, training or education that would qualify him as an expert with respect to the CDC washing guidelines or with respect to the chemical or physical properties of the raw materials from which the hip protection products at issue in this case are made.

Accordingly, this Court should preclude Mr. Goodwin from testifying as to any scientific, technical, or other matters requiring specialized knowledge that falls under the purview of Federal Rule of Evidence 702, and in particular, any evidence regarding the CDC washing guidelines, as well as the materials and performance of the products at issue.

III. CONCLUSION

For the forgoing reasons, Posey's fifth motion in limine should be granted.

Dated: May 15, 2007

J.T. POSEY COMPANY

By its attorneys,

/s/ Douglas H. Morseburg
Jeffrey G. Sheldon (Admitted Pro Hac Vice)
Douglas H. Morseburg (Admitted Pro Hac Vice)
SHELDON MAK ROSE & ANDERSON
100 E. Corson Street, 3d Floor
Pasadena, CA 91103-3842
626.796.4000

Anthony J. Fitzpatrick (BBO # 564324)
DUANE MORRIS LLP
470 Atlantic Avenue, Suite 500
Boston, MA 02210
857.488.4200

CERTIFICATE OF SERVICE

I certify that this document has been filed through the Electronic Case Filing System of the United States District Court for the District of Massachusetts and will be served electronically by the court to the Registered Participants identified in the Notice of Electronic filing.

May 15, 2007

/s/ Donald K. Piper
Donald K. Piper

EXHIBIT "A"

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

Civil Action No. 05-10917 PBS

The HipSaver Company, Inc.,)	
)	
Plaintiff,)	
)	
v)	
)	
J.T. Posey Company,)	
)	
Defendant)	
)	
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J.T. Posey Company, Inc.,)	
)	
Counterclaim Plaintiff)	
)	
v)	
)	
The HipSaver Company, Inc. and)	
Edward L. Goodwin,)	
)	
Counterclaim Defendants)	
)	
)	
)	
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PLAINTIFF HIPSAVER'S DESIGNATION OF EXPERT WITNESSES

Plaintiff, HipSaver, designates the following proposed expert witnesses:

Wilson C. Hayes, Ph.D.
Corvallis, Oregon

Mechanical engineering, biomechanical engineering, injury biomechanics,
anatomy, orthopedics, exercise and sports science

Melvin S. Coons, B.S. Chemical Engineering
Columbus, Ohio
Chemical engineering

Roy J. Epstein, Ph.D.
Belmont, Massachusetts
Marketplace and business damages

THE HIPSAVER COMPANY, INC.
By its Attorneys,

/s/ Courtney M. Quish

Lee Carl Bromberg, BBO No.: 058480

Edward J. Dailey, BBO No.: 112220

Courtney M. Quish, BBO No.: 662288

BROMBERG SUNSTEIN LLP

125 Summer Street - 11th floor

Boston, Massachusetts 02110-1618

(617) 443-9292

(617) 443-0004 (fax)

cquish@bromsun.com

Dated: January 16, 2006

02820/00502 460097.1

CERTIFICATE OF SERVICE

I certify that this document has been filed through the Electronic Case Filing System of the United States District Court for the District of Massachusetts and will be served electronically by the court to the Registered Participants identified in the Notice of Electronic filing.

January 16, 2006

EXHIBIT "B"

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

No. CV-05-10917-PBS

THE HIPSAVER COMPANY, INC.,

Plaintiffs

vs.

J.T. POSEY COMPANY,

Defendants

DEPOSITION OF EDWARD L. GOODWIN

Tuesday, October 18, 2005 9:20 a.m

Duane Morris, LLP

470 Atlantic Avenue, Boston, MA 02110

Reporter: Janet M. Konarski, RMR, CRR

LegalLink Boston

320 Congress Street, Boston, MA 02210

(617) 542-0039

1 APPEARANCES:

2
3 SHELDON & MAK

4 (By Douglas H. Morseburg, Esquire)

5 225 South Lake Avenue

6 Pasadena, California 91101

7 (626) 796-4000

8 Counsel for the Defendant

9
10 BROMBERG & SUNSTEIN LLP

11 (By Edward J. Dailey, Esquire, and

12 Courtney M. Quish, Esquire)

13 125 Summer Street

14 Boston, Massachusetts 02110

15 (617) 443-9292

16 Counsel for the Plaintiff

1 with your ability to recall events or give your best
2 testimony here today that you're aware of?

3 A. Nothing except for just the accumulation
4 of all the information that has transpired over the
5 last four years.

6 Q. Is there any reason the deposition
7 shouldn't go forward today?

8 A. No.

9 Q. Have you ever been convicted of a felony?

10 A. No.

11 Q. Would you give me a description of your
12 post-high-school education, please?

13 A. I have a Bachelor's Degree in Biology and
14 Chemistry from Bridgewater State College, 70 percent of
15 an MBA from Northeastern, and a Master's in Psychology
16 from Cambridge College.

17 Q. I'm sorry, the Bachelor's was in Biology
18 and Chemistry?

19 A. Biology with minors in Chemistry and
20 Education, actually.

21 Q. From?

22 A. Bridgewater State College.

23 Q. You say you completed 70 percent of the
24 requirements for an MBA from?

1 A. Northeastern.

2 Q. And you have a Master's in?

3 A. Psychology.

4 Q. From?

5 A. Cambridge College.

6 Q. What year did you get your Bachelor's from

7 Bridgewater?

8 A. '73.

9 Q. And when did you get your Master's from

10 Cambridge?

11 A. '95.

12 Q. Are you presently employed?

13 A. I'm president of the HipSaver Company.

14 Q. How long have you been the president of

15 HipSaver Company?

16 A. Ten years.

17 Q. What are your responsibilities as the
18 president of the HipSaver Company?

19 A. To design, develop, manufacture and market
20 encapsulated soft hip protectors.

21 Q. Do you presently have any other
22 employment?

23 A. No.

24 Q. What year did you graduate from high

1 besides being the president of HipSaver?

2 A. No.

3 Q. During the last ten years, have you had
4 any other employment besides being the president of
5 HipSaver?

6 A. In '97 through '98, I believe it was, I
7 worked on a consulting basis for a company called Coto
8 Technology.

9 Q. How do you spell that?

10 A. C-O-T-O.

11 Q. What sorts of classes have you taken in
12 engineering? For example, mechanical engineering?
13 Any?

14 A. No.

15 Q. Have you ever had any engineering types of
16 classes?

17 A. Seminars I've went to and so forth.

18 Q. How many seminars regarding engineering
19 have you taken?

20 A. Oh, probably four.

21 Q. What were they called?

22 A. Most of them had to deal with production
23 and operations engineering, safety engineering,
24 industrial engineering.

1 A. Yes. We have a link to the CDC
2 guidelines.

3 Q. Okay. Is this the document that you link
4 to on your website?

5 MR. DAILEY: Objection. He's already said
6 this is some kind of an excerpt, Mr. Morseburg.

7 A. As I see here, some of the content is
8 similar, but I don't believe it's the exact same
9 document.

10 Q. I want you to assume for the moment that
11 these are the CDC guidelines.

12 MR. DAILEY: That is an unfair assumption.
13 We object. He doesn't have to make any such
14 assumption, and he won't. You can characterize them
15 any way you wish, but we won't.

16 BY MR. MORSEBURG:

17 Q. Would you look through the document and
18 see if this document says that the minimum temperature
19 should be 160 degrees for 25 minutes for launderability
20 and infection control?

21 A. Page 101, Paragraph 1, sentence -- I think
22 it's three -- contains what I believe to be what you
23 just said.

24 Q. Would you read that, the part that you're

1 referring to?

2 A. "Hot water provides an effective means of
3 destroying microorganisms. A temperature of at least
4 160 degrees Fahrenheit for a minimum of 25 minutes is
5 commonly recommended for hot water washing."

6 Q. Okay. Would you look down further on the
7 page, please, to the third paragraph.

8 (Witness complies.)

9 Q. Beginning on the third line, the words
10 "several studies." Would you read that, the sentences
11 there?

12 A. "Several studies have demonstrated that
13 lower water temperatures of 71 degrees Fahrenheit to
14 77 degrees Fahrenheit can reduce microbial
15 contamination when the cycling of the washer, the wash
16 detergent and the amount of laundry additive are
17 carefully monitored and controlled. Low level laundry
18 temperatures, low level laundry cycles rely heavily on
19 the presence of chlorine or oxygen-activated bleach to
20 reduce the levels of microbial contamination."

21 Q. Would you read the next two sentences,
22 please?

23 A. "The selection of hot or cold water
24 laundry cycles may be dictated by the state health care

1 facility licensing standards or by other regulation.
2 Regardless of whether hot or cold water is used for
3 washing, the temperatures reached in drying and
4 especially during ironing provide additional
5 significant microbial action. Dryer temperatures and
6 cycle times are dictated by the materials on the
7 fabrics. Manmade fibers, polyester and polyester
8 blends require shorter times and lower temperatures."

9 Q. Isn't it a fact that the CDC guidelines
10 for infection control in health care facilities with
11 respect to laundry instructions specify both hot and
12 cold water washing?

13 MR. DAILEY: Objection. That is not what
14 the document says.

15 A. No. They don't specify that at all.
16 These are guidelines here, and although they might say
17 "several studies have suggested," there is no facility
18 in this country that would be using this second
19 guideline. They all use hot water. And to lead
20 somebody to believe that they should buy a hip
21 protector, for example, based upon this obscure
22 guideline is misleading advertising.

23 Q. Are these obscure guidelines?

24 A. This one here is (indicating).

1 Q. You make reference to these guidelines on
2 your website, right?

3 A. I make reference to the guideline that
4 refers to the minimum of 160 degrees.

5 Q. As if it's the only guideline?

6 MR. DAILEY: Objection.

7 A. It's the only guideline that an
8 institution uses.

9 Q. And you know of this because?

10 A. It's an accepted fact.

11 Q. By you?

12 A. Any person that does institutional
13 laundry.

14 Q. And the basis for the statement is it's
15 just an accepted fact?

16 A. I have never seen or talked to a laundry
17 person that uses low temperature washing on underwear
18 garments. It does not happen.

19 MR. MORSEBURG: Let's have marked as
20 exhibit next in order another multi-page document
21 called Guidelines for Laundry In Health Care
22 Facilities.

23 (Guidelines for Laundry In
24 Health Care Facilities marked Exhibit 5.)

1 Q. HipSaver's website says that only its
2 products meet the CDC guidelines for laundering, right?

3 A. Yes.

4 Q. And by saying that, you're implying other
5 manufacturers' products don't meet that, those
6 guidelines, right?

7 A. That's right.

8 Q. That includes Posey's products, right?

9 A. That's right. His don't meet the
10 guidelines.

11 Q. Posey has a new product out since the
12 settlement, doesn't he? Posey High Durability?

13 A. Yes. But that is no good, either.

14 Q. They don't meet, Posey's High Durability
15 products don't meet the CDC guidelines, either?

16 A. I would say they're about the same as his
17 Confor base pad. The thing you have to realize I've
18 been doing this since 1994, and I worked with both of
19 those pads, those foams he's working with. I know
20 their thermal mechanical properties, and they're both
21 duds as a launderable hip protector, and Posey knows
22 this full well. He's had that Confor pad out there for
23 three years. The significance of it is when you
24 launder it and it degrades, the person thinks they have

1 a hip protector on, but when they fall, they have no
2 protection. Posey knows this. He knows it full well.
3 And now he's playing another slight of hand by saying
4 as a high durability poron pad, which he's trying to
5 associate with a test that didn't even -- assuming that
6 the 2001 test is the one that is being referred to, but
7 they're trying to make it look more contemporary by
8 taking the date off, I assume.

9 We don't know, because we don't have
10 the test. But, what he's trying to do now is go after
11 HipSaver again with a resurrected test, a test that is
12 probably bogus and manipulated data, associating it
13 with a new product that is going to go head to head
14 with HipSaver, in his mind, okay, bear in mind, in his
15 mind, in the laundry, and that pad is not a high
16 temperature pad. You can -- I have what I institute,
17 what I call the sandwich test. You can put that pad in
18 an oven, bend it in half, 185 degrees, the thing just
19 fractures right along. So, every time it's going to
20 flex in the dryer, it's going to fracture this way
21 (indicating), fracture that way (indicating). Before
22 you know it, you have a pile of dust in the pouch.

23 This is what I've been fighting Posey
24 on since 2001. He stole my product, made it cheaper,

1 and ruined to a large extent the product category of
2 hip protectors. So, his new high durability is not
3 highly durable.

4 MR. MORSEBURG: Would you read my
5 question, please.

6 (The pending question was read by the
7 reporter as requested.)

8 Q. The short answer to my question is, no,
9 they don't. Is that right? I think that is what you
10 said in your long answer, but rather than move to
11 strike it -- I'll move to strike as nonresponsive.
12 But, do I take it from your last response, in your
13 estimation, Posey's high durability hip pads don't meet
14 the CDC laundry guidelines?

15 MR. DAILEY: Objection.

16 A. I don't know.

17 Q. Your answer is you don't know whether
18 Posey's high durability product meets the CDC
19 guidelines?

20 MR. DAILEY: Objection.

21 A. It depends on which CDC guideline we're
22 going to be talking about here now. The first CDC
23 guideline they always referred to was 160 degrees.
24 Okay. Then in the lawsuit of Posey 1, they realized

1 after they got hit over the head with the fact that the
2 VA system said the things all fell apart in every
3 hospital, they had to downgrade the temperature from
4 160 to 120, so basically Posey took three years to face
5 up to the fact that his air Confor-based product was
6 not CDC launderable. Now, what he does is say, okay,
7 we're going to go with the lower temperature CDC
8 standard, which requires higher bleach, which will
9 degrade the product just as fast as if you washed it in
10 a hot dryer.

11 Q. So, the CDC laundry guidelines do have two
12 alternative wash?

13 A. That is what we discussed earlier here
14 today.

15 Q. Yes.

16 A. Yes. But, the second one is an obscure
17 study that nobody in the world uses. It's just a
18 slight of hand by Posey to attach that CDC
19 launderability guideline on there.

20 Q. Whether anybody uses them or not, the CDC
21 guidelines specify high temperature and low temperature
22 washing, right?

23 MR. DAILEY: Objection.

24 A. No, they don't.

1 Q. They only specify high temperature
2 washing. Is that what you're saying?

3 MR. DAILEY: Objection.

4 A. No.

5 Q. The CDC guidelines allow for the
6 possibility of high temperature washing. True?

7 MR. DAILEY: Objection.

8 A. That's correct.

9 Q. They also allow for the low temperature
10 washing, true?

11 MR. DAILEY: Objection.

12 A. More information has to be added there.

13 Q. What information needs to be added?

14 A. What needs to be added there is that the
15 main standard 165 degrees -- 160 degrees for 25
16 minutes. This one, he's now playing the shell game to
17 make reference to, refers to some studies suggest that
18 lower temperature microbial elimination can be achieved
19 with higher levels of breach and controlled
20 circumstances that nobody in the world is going to do.
21 So, he is suggesting in his advertisement -- he should
22 supply the whole standard, the concentrations of
23 detergents and bleaches required to every customer that
24 buys a Hipster, because nobody even knows what that is.

1 The only thing that people in nursing
2 homes and hospitals know is that hot is good, and
3 bleach and detergent facilitate the process.

4 Q. The CDC guidelines that we're talking
5 about don't say recent studies suggest that low
6 temperature washing is okay. The CDC guidelines in
7 fact say "Recent studies show..." Isn't that true?

8 MR. DAILEY: Objection.

9 A. That's true. Any of these questions about
10 the CDC have to be understood on the backdrop of Posey
11 changing his requirements for launderability of his
12 Hipsters going back to October, at about the settlement
13 date.

14 MR. MORSEBURG: Would you read that last
15 part back. Please.

16 (Answer read by the reporter as
17 requested.)

18 Q. Has HipSaver done any testing of Posey
19 products to see if they meet the CDC guidelines for
20 laundering since --

21 MR. DAILEY: Objection.

22 Q. -- since September of 2004?

23 MR. DAILEY: Objection. What guidelines
24 are you talking about?